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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA, ) No. CR-07-00554 JF  
11 )  
Plaintiff, ) DEFENDANT'S RESPONSE TO  
12 vs. ) GOVERNMENT'S SENTENCING  
13 ) MEMORANDA  
DOMINIC CHANG, )  
14 Defendant. )  
15

16 INTRODUCTION

17 The government's argument for a sentence of imprisonment is based on an outdated  
18 vision of the Sentencing Guidelines, and on an unsubstantiated speculation that Mr. Chang has in  
19 some way compounded his tax evasion through a surmised concealment of assets and income  
20 beyond the charged offenses, an allegation that even the government's own investigating agent  
21 has characterized as obviously problematic. Although the government's suspicions of Mr. Chang  
22 and its nostalgia for an era before *Booker* may be predictable, even on some level understandable,  
23 its contentions are incorrect. In view of Mr. Chang's background and history and the nature and  
24 circumstances of the offense, a sentence of probation and home confinement is sufficient and no  
25 greater than necessary to achieve the multifaceted objectives of sentencing.

## ARGUMENT

### **I. The Doctrinal Arguments Advanced by the Government Have Been Rejected by the Supreme Court and Ninth Circuit**

The government relies largely upon pre-*Booker* authorities that treated the Guidelines as mandatory and restricted variances from the Guidelines to enumerated “departure” grounds, notwithstanding the federal courts’ now-unanimous agreement that such a restrictive interpretation violates the Sixth Amendment. It similarly relies on out-of-circuit decisions rendered in the interval between *Booker* and *Rita*, *Gall* and *Kimbrough*, out-of-circuit decisions wholly discredited by those later rulings of the Supreme Court. Although the government’s arguments might have been doctrinally sound at the time that the matter was first transferred from the civil division for criminal investigation, the passage of years during the criminal investigation has not only witnessed Mr. Chang’s extensive cooperation in meetings with criminal investigators, despite the correspondingly prolonged emotional distress documented in the defense sentencing memorandum filed May 7, 2008, but have also permitted the Supreme Court to further clarify the import of its Sixth Amendment decision in *Booker* and its progeny.

The government fails to respond to or even to acknowledge the Supreme Court’s decisions in *Gall*, *Rita* and *Kimbrough*. The government’s reliance upon *United States v. Ture*, 450 F.3d 352 (8<sup>th</sup> Cir. 2006), is particularly misplaced. The Eighth Circuit decided *Ture* at a time when Eight Circuit precedent required its district courts to presume that a sentence within the guideline range was reasonable. *See, e.g., United States v. Gall*, 446 F.3d 884, 889 (8<sup>th</sup> Cir. 2006). Notably, the Eighth Circuit even prior to the Supreme Court’s reversal of *United States v. Gall* had taken pains to limit the scope of *Ture*:

Although all of these cases involved the reversal of downward variances that had resulted in probation when the Guidelines had called for imprisonment, they do not stand for a blanket rule that all such variances are unreasonable. Such a rule would amount to the judicial elimination of a sentencing option that would otherwise be available under federal criminal statutes that do not impose mandatory imprisonment, including the statute at issue in this case. This judicial rule would effectively require imprisonment for defendants whose offense level falls within Zone B or above within the sentencing table

1 of the Guidelines. That kind of categorical, mandatory approach to sentencing on the  
 2 basis of judicially-found facts is precisely the type of sentencing regime the Supreme  
 Court rejected in *Booker*.

3 *United States v. Wadena*, 470 F.3d 735, 738 (8<sup>th</sup> Cir. 2006) (distinguishing *Ture* and affirming  
 4 district court's sentence of probation, in lieu of guideline sentence of 18 to 24 months); *see also*,  
 5 *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8<sup>th</sup> Cir. 2006) (author of panel opinion, in a  
 6 separate footnote, citing *Ture* and other decisions as evidence that the Eighth Circuit post-*Booker*  
 7 was failing to modulate its approach to sentencing in accordance with that Supreme Court  
 8 decision). The Eighth Circuit rule that district courts must treat the guidelines range as  
 9 presumptively reasonable was expressly rejected in the Supreme Court's unambiguous reversal  
 10 of the Eighth Circuit in *Gall v. United States*, 128 S.Ct. 586 (2007). Accordingly, after that  
 11 decision of the Supreme Court, the district court in *Ture* imposed the identical sentence that the  
 12 appellate court had earlier reversed, a sentence significantly less onerous than recommended by  
 13 the Probation Office in the instant case: probation for a term of two years, no period of  
 14 confinement, and 300 hours of community service, notwithstanding a tax loss of \$240,252  
 15 (approximately 50 percent greater than the tax loss in the instant case). Exh. I. The interest  
 16 noted by the government in avoiding sentencing disparity would appear to support the Probation  
 17 Office's recommendation, or even a lesser sentence, in view of Mr. Chang's age, mental and  
 18 physical health, and tax loss as compared with Mr. Ture's.

19 The government also cites *United States v. Burgos*, 276 F.3d 1284, 1290 (11<sup>th</sup> Cir. 2001)  
 20 for the proposition that "[f]or a judge sentencing a defendant convicted of tax evasion, the chief  
 21 concern may be general deterrence." Leaving aside the pre-*Booker*, pre-*Blakely* publication of  
 22 *Burgos*, the unexpurgated whole of the footnote from which this dictum is excerpted is more  
 23 nuanced than the inference the government invites:

24 Obviously, a judge may give one goal more weight than others in a particular case. For  
 25 example, a judge may consider punishment the primary goal for a defendant convicted of  
 26 homicide; whereas, specific deterrence may be the goal heavily weighted in fashioning a  
 sentence for a recidivist. For a judge sentencing a defendant convicted of tax evasion, the

chief concern may be general deterrence, and, if sentencing a defendant who is a one-time offender, a judge may avoid incarceration and focus on rehabilitative programs. Further, we have explained elsewhere that, “for purposes of determining the need for incarceration, Congress specified that only the first three goals, punishment, general deterrence, and specific deterrence, could be considered.” *See, e.g., United States v. Roman*, 989 F.2d 1117, 1122 n.9 (11th Cir. 1993) (Tjoflat, C.J., specially concurring) (emphasis added); *see also United States v. Scroggins*, 880 F.2d 1204, 1208 (11th Cir. 1989). While Congress prohibited incarcerating an offender for purposes of rehabilitation, *see United States v. Dunnigan*, 507 U.S. 87, 97, 113 S. Ct. 1111, 1118, 122 L. Ed. 2d 445 (1993), an offender’s need for rehabilitation may be considered in prescribing the conditions of probation or supervised release. *Scroggins*, 880 F.2d at 1208 n.10 (citing 18 U.S.C.A. § 3563(b)).

*Id.*, n. 6. Taken in context, the 11<sup>th</sup> Circuit in *Burgos* was not announcing or even proposing a general rule that district judges should consider general deterrence as the preeminent concern in all tax evasion cases; rather it was merely providing possible illustrations of the different ways in which district judges might exercise their discretion in different individual cases, without suggesting the rigid approach advanced by the government here. Moreover, to the extent that the government urges this Court to make an example of Mr. Chang on the theory that general deterrence is the most important 3553(a) factor, the Supreme Court has declined to privilege any one of the 3553(a) factors over any other, and the Ninth Circuit has unambiguously held that no factor is entitled to greater weight than the others. *United States v. Carty*, – F.3d –, 2008 WL 763770 (9th Cir. Mar. 24, 2008) (en banc) at \*4 (no single factor identified in § 3553(a) is entitled to greater weight than any other). Mr. Chang is no Wesley Snipes; to the extent that he has become a public figure, he owes this standing exclusively to the government’s tactical deployment of press releases. He should not now be punished more harshly because of the government’s election to make him the current face of tax evasion in the local Chinese American community.

## **II. The Government Has Substantially Misconstrued the Nature of Mr. Chang’s Post-Offense Conduct and Statements**

Much like its revanchist gloss on the applicable law, the government’s interpretation of Mr. Chang’s post-offense personal and business dealings lacks merit. The government points to

1 Mr. Chang's initial denial of guilt and his transfer of his business to Thanh Lam as aggravating  
2 factors, whereas both, upon more careful examination, are of doubtful relevance, especially in  
3 light of the evidence, set forth more fully in the Defendant's Sentencing Memorandum filed May  
4 7, 2008, from Mr. Chang's friends and family of the profound effect that this prosecution has had  
5 upon him and of the particular circumstances that contributed to his commission of the offense.

6 Mr. Chang does not dispute that he denied guilt during the IRS' civil audit. It should be  
7 noted, as a threshold matter, that Mr. Chang's initial denial of guilt does not materially  
8 distinguish him from the vast majority of criminal tax evasion defendants. Indeed, both counsel  
9 for the government and Special Agent Bailie have separately commented to the undersigned that,  
10 but for the false denial of guilt, Mr. Chang would not have been prosecuted criminally. As to the  
11 government's contention that Mr. Chang continued to deny his guilt during the criminal  
12 investigation, the statements that the government characterizes as untruthful are (1) Mr. Chang's  
13 statement to investigating agents that he had been unaware that his Wells Fargo account was still  
14 open after his previous gas station business shut down, and (2) his statement that he was unsure  
15 whether he provided his tax preparer with his Wells Fargo bank statements. As a threshold  
16 matter, it should be noted that although Mr. Chang has a functional command of the English  
17 language, he has twice failed to demonstrate the level of fluency deemed necessary to run a gas  
18 station franchise. Exh. B. Assuming that his lack of fluency did not in any way limit his grasp of  
19 either the import of a particular question or the time frame to which a particular question  
20 pertained, these two statements at the outset of the criminal investigation are vastly outweighed  
21 by the extent and duration of his purely voluntary cooperation both in the initial interview and in  
22 several additional meetings over the ensuing year. Agent Bailie in his report makes clear that  
23 Mr. Chang admitted his tax evasion in their first meeting and subsequently met with the agent on  
24 several occasions outside the presence of his then-counsel in order to cooperate in the  
25 investigation, that Mr. Chang disclosed to the best of his ability every business-related deposit  
26

1 that he had previously concealed in his original tax filings, and that in subsequent tax returns,  
2 Mr. Chang reported no business expenses or nontaxable transactions, to his detriment.

3 Although the government's suspicions are understandable in view of the tax evasion to  
4 which Mr. Chang has confessed, the government has not considered the practical and legal  
5 necessity for the transfer of ownership. As a result of his mounting debt and ensuing business  
6 troubles, Mr. Chang had obtained \$15,000 in financial assistance from his girlfriend, Thanh Lam,  
7 in February 2004, prior to their short-lived marriage. PSR ¶60. That amount exceeded not only  
8 the depreciated value of the new and used equipment which Mr. Chang purchased to establish the  
9 business before the couple met, but also the purchase price and replacement value of those assets.  
10 PSR 60; Exh. H. The \$15,000 enabled Mr. Chang to pay off a fraction of his delinquent  
11 accounts, but did nothing to rehabilitate Mr. Chang's by-then nonexistent credit rating or to  
12 enable the business in continuing to operate. To protect herself and her investment, Ms. Lam, a  
13 bookkeeper by training, became a partner in the business and assumed full-time stewardship of  
14 the business accounts and bookkeeping upon the couple's marriage in 2004.<sup>1</sup> As a co-owner, Ms.  
15 Lam, like Ms. Wu had been before her, was essential to Mr. Chang's ability to remain in business  
16 during their marriage. When the couple decided to divorce, Ms. Lam became the sole owner of  
17 the business, because Mr. Chang no longer had the credit necessary to run the business or the  
18 resources to buy her out, and because the City of Milpitas had restricted their ability to transfer  
19 the business license to a third party, whereas dropping Mr. Chang as co-owner remained

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21 <sup>1</sup>The couple recalls applying to add Ms. Lam to the Milpitas business license on or about  
22 their marriage in 2004. The City of Milpitas issued a business license tax receipt to the couple as  
23 co-owners of the business, in July 1, 2005, but because of the anticipated divorce settlement, Mr.  
24 Chang's name was deleted from the license and an amended receipt was issued for July 1, 2005,  
25 this one solely in Ms. Lam's name. Since that time, the business license has remained in Ms.  
26 Lam's name exclusively, although the name of the business continues to reflect Mr. Chang's  
given name in an effort to retain what remains of his customer base. Exh. G. Accordingly, the  
government's contentions that Mr. Chang is defrauding the City of Milpitas by maintaining the  
business license in his own name and that the City of Milpitas prohibited the addition of Ms.  
Lam to the business license, are in error.

1 permissible. Exh. H.

2 Beyond Ms. Lam's investment of time and money in the business, she has put significant  
3 effort into assisting in Mr. Chang's rehabilitation. Mr. Chang disclosed in the presentence  
4 investigation that Ms. Lam personally escorted him to Gamblers' Anonymous meetings, in an  
5 effort to address what she recognized was the root cause of his financial troubles. Mr. Chang's  
6 daughter Jennifer reports that Ms. Lam has kept the business accounts under her sole control and  
7 has specifically counseled his children against helping him to open personal credit card accounts  
8 with them (Mr. Chang and Ms. Lam independently confirmed this report). Ms. Lam moreover  
9 has lived with Mr. Chang throughout the duration of the criminal investigation and has witnessed  
10 the extent of the emotional toll Mr. Chang has experienced as a result of his tax evasion and  
11 prosecution. PSR ¶48.

12 The government has invited this Court to speculate that Ms. Lam, the person who has  
13 demonstrated a commendable degree of watchful supervision in anticipating and guarding  
14 against Mr. Chang's known vulnerabilities, is engaged with him in a continuing fraud on the IRS,  
15 despite the IRS' express warnings to her of its continuing scrutiny of the business. This  
16 speculation is without evidentiary or logical foundation. The government asserts that the  
17 consideration for the 2005 transfer was inadequate, but it has failed to identify a basis for this  
18 conclusion, other than the volume of gross receipts for the 1999-2001 tax years,<sup>2</sup> well before Mr.  
19 Chang's damaged credit impaired his ability to run the business independently, before the  
20 notoriety that the government's publication of his tax evasion conferred upon him, and before the  
21 clientele he had built at the Chevron and Unocal stations during his first marriage had diminished  
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23 <sup>2</sup>The estimate of gross receipts for 1999-2001 was based upon Mr. Chang's dogged post-  
24 confession efforts in 2006-2007 to cooperate with the criminal investigation by guessing, with  
25 minimal documentation, which bank deposits were business revenues, rather than nontaxable  
26 transactions. While the defense does not proffer an alternate revenue or tax loss estimate, it  
respectfully submits that the reliability of the government's methodology is open to question



1 in proportion to the relative inconvenience of his newer, less central and more obscure location  
 2 and his absences from the shop during prolonged gambling binges. PSR ¶9. Implicit in the  
 3 government's reliance on the 1999-2001 gross receipts are the questionable assumptions (1) that  
 4 the business today is as active it was in 1999 despite the notoriety the government has visited  
 5 upon Mr. Chang through its media relations, (2) that Mr. Chang's credit history and bankruptcy  
 6 have had no lingering impact on its access to vendors, the speed with which it can obtain  
 7 necessary parts for repairs and corresponding customer satisfaction, and (3) that the survival of  
 8 the business owes nothing to the labor and stewardship of Ms. Lam.<sup>3</sup> The defense has identified  
 9 for the Probation Office the business' tangible assets, in an inventory of its non-leased  
 10 equipment, as well as pricing information for the same or comparable items; the government has  
 11 failed to respond to a defense discovery request dated April 18, 2008 for any corresponding  
 12 inventory of equipment produced by the IRS during the civil examination and its many visits to  
 13 the business. The adverse inference sought to be drawn by the government also flies in the face  
 14 of the compelling testimonials offered by Mr. Chang's friends, family and long-time customers  
 15 as to his exemplary character and the unique combination of circumstances that led him to  
 16 commit the highly uncharacteristic instant offenses.

17 The tax returns Mr. Chang filed for 2002 and 2003 also belie the government's  
 18 unsubstantiated charge that he is continuing to evade his tax obligation. According to the report  
 19 of Agent Bailie furnished by the government to the Probation Office:

20 The 2002 and 2003 returns referenced in the Referral were prepared by James Sullivan  
 21 after the civil examination began. Mr. Sullivan told the investigating agent that he  
 22 arrived at the income figures on these unsigned returns by simply totaling all deposits into  
 Chang's bank accounts without accounting for transfers or nontaxable items. Chang's

23 <sup>3</sup>On an unannounced visit to the shop by the undersigned, Ms. Lam was at work in the  
 24 shop's makeshift office in sweltering heat on an unannounced afternoon visit to the shop by the  
 25 undersigned. Mr. Chang and one assistant were the only others present. Ms. Lam reports several  
 26 years of full-time employment as a bookkeeper prior to a leave of absence and resignation upon  
 her mother's death in 2003.



1 refusal to sign the returns under these circumstances can hardly be considered an  
2 indication of fraud. With regard to Chang's original failure to file his 2002 and 2003  
3 returns (i.e., before the civil examination commenced), his return preparer admits that he  
4 received, but never looked at the materials which Chang provided to him to prepare those  
returns. This would seem to present obvious complications with proving criminal intent  
or willfulness in an evasion charge. Consequently, it was decided that the criminal  
investigation would be limited to the 1999, 2000, and 2001 tax years.

5 Mr. Chang's conclusion that the 2002 and 2003 returns overstated his tax obligation was, as  
6 Agent Bailie acknowledges, correct. Nonetheless, he duly filed those returns, albeit unsigned, to  
7 the IRS. In addition, his effort to persuade his younger brother to lend him money to satisfy his  
8 tax obligation, together with his often-expressed concern that he may die without having paid his  
9 debt in full, indicate the seriousness with which he views his continuing duty to pay. Exh. A.  
10 That he has candidly admitted his desire to prevent Ms. Lam from paying with her labor and  
11 investment in the business for crimes he had committed before they ever met, does not diminish  
12 his acceptance of that obligation.

### 13 CONCLUSION

14 For the foregoing reasons, the defense respectfully requests that this Court impose a  
15 sentence of probation, with an appropriate term of home confinement as well as mental health  
16 counseling as a condition of Mr. Chang's probation supervision.

17 Dated: May 16, 2008

18 Respectfully submitted,

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20 Federal Public Defender

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22 s/  
23 CYNTHIA C. LIE  
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